

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NEIL K. GILDART)	
Claimant)	
VS.)	
)	Docket No. 1,003,369
YOUNG'S WELDING, INC.)	
Respondent)	
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the December 13, 2004, Award entered by Special Administrative Law Judge Marvin Appling. The Board heard oral argument on June 7, 2005.

APPEARANCES

Garry W. Lassman of Pittsburg, Kansas, appeared for claimant. Dwight D. Fischer of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, at oral argument before the Board, the parties agreed that (when computing claimant's award) the temporary disability benefits that claimant received should be converted to temporary total disability weeks by dividing the total amount of those benefits by the temporary total disability rate.

ISSUES

Claimant injured his right knee on May 22, 2001, while working for respondent. The parties agree claimant sustained a permanent injury to his knee and that he should receive permanent disability benefits under the schedules of K.S.A. 44-510d. In the December 13, 2004, Award, Judge Appling found the opinions of Dr. John G. Yost, Jr., were far more

credible than those of Dr. Kenneth A. Jansson. Consequently, the Judge concluded claimant sustained a 30 percent functional impairment to his right knee.

Respondent and its insurance carrier contend Judge Appling erred. They argue Dr. Yost's impairment rating should not be considered as it allegedly came from the *AMA Guides*¹ (5th ed.), rather than the *AMA Guides* (4th ed.) as required by statute. Accordingly, they request the Board to adopt Dr. Jansson's opinion that claimant sustained a two percent impairment to the right leg. In the alternative, respondent and its insurance carrier request the Board to average the doctors' impairment ratings and to find that claimant has sustained a 16 percent impairment to his right leg.

Conversely, claimant argues Dr. Yost used the *Guides* (4th ed.) as a basis to rate claimant but the doctor also used his medical knowledge in addressing the residuals from the injury that are not fully addressed by the *Guides*. Claimant also argues that Dr. Jansson's rating is suspect as the doctor only rated claimant's lateral meniscus tear and did not rate claimant's medial meniscus tear or the injury to the articular surface of the knee joint or the kneecap, which had been chipped away.

The only issue before the Board is the extent of functional impairment claimant sustained to his right leg due to his May 22, 2001, accident at work.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

On May 22, 2001, a tire rolled into claimant's right knee, causing him to fall to the ground in severe pain. The parties agree claimant's accident arose out of and in the course of his employment with respondent.

After first seeing two other doctors, respondent and its insurance carrier referred claimant to Dr. John G. Yost, Jr., a board-certified orthopedic surgeon. Dr. Yost first saw claimant in June 2001. And in July 2001 the doctor operated on claimant's right knee and trimmed torn pieces of meniscus, removed fragments of bone that had chipped off the kneecap, and smoothed rough edges of the joint.

Dr. Yost released claimant from care in October 2001. But the doctor saw claimant in April 2004 for a final evaluation for purposes of this claim. The doctor found no significant changes from October 2001. Using criteria from the *AMA Guides* (5th ed.),

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*.

which the doctor stated were the same as the *AMA Guides* (4th ed.) for evaluating a knee injury, combined with his general medical assessment to rate claimant's swelling, atrophy, secondary skin changes, joint looseness, and persistent edema, Dr. Yost concluded claimant sustained a 30 percent functional impairment to his right leg. According to the doctor, claimant is a candidate for a future knee replacement. Dr. Yost attributed the arthritis in claimant's right knee, as well as the ongoing symptoms, to claimant's May 2001 accident at work.

On the other hand, Dr. Kenneth A. Jansson, who is also a board-certified orthopedic surgeon, examined claimant in March 2003 at respondent and its insurance carrier's request. Dr. Jansson concluded claimant sustained a two percent impairment to the right leg due to the May 2001 accident. But the doctor also noted claimant's impairment rating could be higher if claimant had terrible problems and wanted further treatment.

But Dr. Jansson's testimony should be considered in light of claimant's testimony regarding their visit. Claimant's testimony is uncontradicted that Dr. Jansson spent little time examining claimant but appeared more interested in the litigation. Claimant testified, in part:

The most, three quarters of the questions were about the lawsuit, that I chose to fight this and how come you did and where is it, where is this lawsuit at and the whole thing.

Excuse me, but I [have] got to say it because I feel it, the whole doctor visit was as big of [a] farce as I have been [in] in a long time, I'm sorry.²

The Board acknowledges there are problems with both doctors' impairment ratings. The Board is not persuaded Dr. Jansson rated the entire injury claimant sustained or considered all of the resulting consequences. On the other hand, the Board is not persuaded as to the accuracy of Dr. Yost's rating as he provides little explanation for how he reached his final rating. Accordingly, the Board concludes the two percent rating and the 30 percent rating should be averaged. Consequently, the Board finds claimant has sustained a 16 percent impairment to his right leg due to his May 2001 accident at work.

The record does not establish that claimant had a preexisting functional impairment in his right knee before the May 2001 accident. Accordingly, the award of permanent disability benefits should not be reduced under K.S.A. 44-501(c).

² R.H. Trans. at 17.

AWARD

WHEREFORE, the Board modifies the December 13, 2004, Award and grants claimant benefits for a 16 percent permanent disability to the right leg under the schedules of K.S.A. 44-510d.

Neil K. Gildart is granted compensation from Young's Welding, Inc., and its insurance carrier for a May 22, 2001 accident and resulting disability. Based upon an average weekly wage of \$557.19, Mr. Gildart is entitled to receive 17.23 weeks of temporary total disability benefits at \$371.48 per week, or \$6,401, plus 66.04 weeks of permanent partial disability benefits at \$371.48 per week, or \$24,532.54, for a 16 percent permanent partial disability, making a total award of \$30,933.54, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of June, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Garry W. Lassman, Attorney for Claimant
Dwight D. Fischer, Attorney for Respondent and its Insurance Carrier
Marvin Appling, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

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ORDER NUNC PRO TUNC

The Board's June 30, 2005, Order contains a clerical error and it is corrected, as follows:

Neil K. Gildart is granted compensation from Young's Welding, Inc., and its insurance carrier for a May 22, 2001 accident and resulting disability. Based upon an average weekly wage of \$557.19, Mr. Gildart is entitled to receive 17.23 weeks of temporary total disability benefits at \$371.48 per week, or \$6,401, plus 29.24 weeks of permanent partial disability benefits at \$371.48 per week, or \$10,862.08, for a 16 percent permanent partial disability, making a total award of \$17,263.08, which is all due and owing less any amounts previously paid.

The remainder of the June 30, 2005, Order remains as written.

IT IS SO ORDERED.

Dated this ____ day of July, 2005.

BOARD MEMBER

BOARD MEMBER

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c: Garry W. Lassman, Attorney for Claimant
Dwight D. Fischer, Attorney for Respondent and its Insurance Carrier
Marvin Appling, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director